United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1114

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P/S

To be argued by
HARRY BLUM

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 75-1114

GARY SINGLETON, WILLIAM M. KIRBY,
and WILLIAM ELMORE,

Appellants.

BRIEF FOR APPELLANT WILLIAM M. KIRBY

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DIRTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Appellee,

-against-

GARY SINGLETON, WILLIAM M. KIRBY, and WILLIAM ELMORE,

Appellants.

Docket No. 75-1114

BRIEF FOR APPELLANT
WILLIAM M. KIRBY

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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STATEMENT PURSUANT TO RULE 28 (a) (3)

Preliminary Statement

This appeal is taken from a judgment of conviction entered into at the Eastern District of New York for the United States District Court. At trial the Honorable John J. Bartels presided.

Appellant William M. Kirby appeared at trial before a jury and was charged with knowing possession of stolen mail in violation of 18 U.S.C. section 1708. Mr. Kirby was sentenced and committed to the United Stated Attorney pursuant to section 4252 of Title 18, under the Narcotics Rehabilitative Act.

STATEMENT OF FACTS

Because of the nature of this appeal and the questions presented the statement of facts cannot hope to explore the facts totally. To aide in this purpose an appendix is included, further specific instances and questions will be reported in body of the argument.

BACKGROUND INFORMATION

On January 13, 1975, prior to the selection of the jury a suppression hearing was held, the purpose of which was to prevent photographs, taken by the Government, of the defendant from being produced at trial, and identified by George Attmore. In attendance were Richard Appelby and John Caden for the District Attorney's

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

-against-

GARY SINGLETON, WILLIAM M. KIRBY, and WILLIAM ELMORE,

Appellants,

Docket No. 75-1114

BRIEF FOR APPELLANT
WILLIAM M. KIRBY

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

ISSUES PRESENTED FOR REVIEW

1. Whether the conviction of William M. Kirby for possession of stolen mail (18 U.S.C. section 1708, 2) must be reversed and dismissed for failure by the Government to prove the charges of aiding and abetting beyond a reasonable doubt.

2. Whether at trial there was undue interference on the part of the District Court Judge preventing a fair and impartial trial.

3. Whether it was plain error in the Court's instructions to the jury that there exists no difference between a finding of guilt on either the constructive possession or the aiding and abetting theorey.

4. Whether it was error, during sentencing, to sentence the appellant Kirby under the Narcotics Addict Rehabilation Act, rather than under

Office; Harry Blum for defendant Kirby, Edward Kelly for defendant Elmore and Edward Malz for defendant Singleton, the Honorable John R. Bartels presided.

On the stand for the Government was a letter carrier, George Attmore, Mr. Attmore had identified the appellants through photographs and Mr. Appleby was attempting to have those photographs placed into evidence. After a few futile attempts, the Court on it's own initiative took charge of the Government's case, through the next eight pages of the record the Court questioned Mr. Attmore concerning the exhibits. (pages 47-54, Appendix A).

Throughout the suppression hearing the Court asked questions the witnesses, interupted counsel, and answered the attorney's inquiries for the witnesses over one hundred times, at the hearing alone. The expressed purpose of the Court's remarks were to move the hearing forward and to expedite the trial. The essence of this aura of speed can be demonstrated by the following statement:

> The Court: I see. All right, very well. Now what's your next point Mr. Blum? We must proceed. I wouldn't want to make this a 'whole week case'.

Throughout the suppression and hearing and trial there existed a sense of urgency, a feeling that was communicated to the attorneys, witnesses and to the jury.

THE FACTS

As indicated above the chief witness for the State was a Postal Service employee, George Attmore. Mr. Attmore in his capacity as letter carrier worked delivering mail in a residential area of Jamaica, Queens. He testified that while engaged in his vocation

a theft occurred involving approximately 500 pieces of mail that he was to deliver. The theft occurred from a "mail jeep" which Mr. Attmore used during his rounds, the jeep was locked and unattended when the theft occurred.

The Federal vehicle was parked at 146 Street and 130th. Mr. Attmore was in the process of delivering mail when he initially observed a "late model" green 1968 or 1969 Ford Falcon. (961) The suspects vehicle was parked parallel to the jeep, facing in the same direction. The Government claimed that the Falcon and Jeep were so close it was impossible for anyone to walk between the two vehicles. (105). At the suppression hearing the same facts were testified to:

> The Witness: Parallel and so close you couldn't walk between the two.
>
> The Court: Gee, so close? (indicating) (66)

Mr. Attmore further stated that two people, later identified as co-defendants Singleton and Kirby were seated inside the Falcon Mr. Singleton acting as the driver and Mr. Kirby occupying the front passenger seat. (110-111)

A third individual was said to be standing outside the car, on the curb side, with his head in the vehicles window speaking with it's occupants. The witness described the unidentified person, later cited as co-defendant Elmore, as a male black dressed in dark slacks and a multi-colored shirt, weighing between 175 to 180 pounds and approximately 5'10" tall. (page 112-114)

At no time did Mr. Attmore see the defendant's Kirby or Singleton out of the car, nor in any other position than sitting. However he did state he had seen William Kirby prior the day in question.

Mr. Elmore was later identified following his arrest.

Mr. Attmore never spoke to either the occupants of the car or the pedastrian. Much time was spent by the Government examing the work habits of the witness, it may be summarized as follows. Following one step of his route(107,108) Mr. Attmore returned to his jeep for another sack of mail. The automobile was still in the parked position as he had first observed it about four minutes earlier. (page 114) As the letter carrier approached the jeep on foot the Falcon slowly moved away down the street: the third party walking alongside with his head still inside the vehicle. The automobile came to rest, on the opposite side of the street, still facing in the same direction. Because of his suspicion Mr. Attmore copied down the license number of the car, 336 QF-2. (116)

Mr. Attmore unlocked the doors of the mail-jeep and removed another sack from the truck's contents. Relocking the vehicle Mr. Attmore proceeded on the next "loop" of his route. (126-130)

Completing this section of his tour consisted of approximately twelve minutes. (Making the time approximately 12:35 P.M.) At the termination of this swing the letter carrier returned to the vehicle finding that it had been physically broken into, and a sack of mail removed. The green Falcon that had invoked Mr. Attmore's attention was no longer in view (126). As were his instructions in the event of such happenings, Attmore used the phone in one of his clients homes to telephone the Office of the United States Postal Inspectors; during his report he revealed the license and description of the Green Falcon (133,135-136).

Approximately an hour after the original call, from George Attmore,

was recieved at the Inspectors Office, the wanted vehicle was seen by Postal Inspectors who were searching the area in unmarked vehicles. The car, including the suspects were seen in the Jamaica Station area. (285-286)

The next Government witness called to the stand was Phillip Rizulli, one of the Postal Inspectors who responded to George Attmore's call. The inspector recalled that the automobile he was occupying pulled up along the curb, in front of the parked Falcon, along with one of his partners, Inspector Cole, he approached the car-in question. The Government Officers identified themselves and ordered the occupants out of the car (291-293). Both defendant Kirby and defendant Elmore exited upon request leaving Gary Singleton still at the wheel of the vehicle. Mr. Kirby and Mr. Elmore were searched and patted down by the officers (294-297).

While the officers occupied themselves with the aforementioned defendants Mr. Singleton seized the oppurtunity to flee.

As he pulled away from the curb he threw, from the moving car a rolled up plaid jacket later identified as belonging to Elmore. (302-304) (378-379). Upon inspection of the jacket by Inspector Rizulli, it was found to hold an envelope containing four checks, the envelope had been opened previously and the names appearing on the checks matched names and addresses of residents in Mr. Attmores's district. (305-306) Inside the jacket-pocket was a wallet belonging to defendant Elmore. When first questioned about the jacket Elmore denied knowing who it belonged to. The two defendants Elmore and Kirby were taken into custody and brought to the Jamaica Post Office for processing and classification. (314)

After a brief chase Gary Singleton was apprehended and taken into custody.

At trial the defendant Kirby took the stand on his own behalf. He testified, after a great deal of banter concerning his mother's type of employment (page 409-412) that he had not participated in any respect in the crime, that he was free of all involvement. Mr. Kirby stated that he had met the defendant Elmore at 12:50 on that day in question at the corner of 149th Street and Rockaway. The two had made arrangements to go shopping. While on their way to the bus station they encountered Gary Singleton. Mr. Kirby stated that while he was a friend of Elwood he was a mere acquantaince of Mr. Singleton. The original duo was offered a lift by the driver and they consented. (405-411) William Kirby reiterated his denial of all participation in the theft of the checks and their subsequent occupation in Elmore's jacket. page430]

The defense case carried only one other witness, that was Agent O'Niel, who was called by Mr. Elmore's counsel.

Agent O'Niel stated that he had run a check on the New York license plate of the green Falcon with the New York State Department of Motor Vehicles, his discovery resulted in the fact that the car was registered in the name of Gary Singleton the co-defendant who was driving.

The Court charged the jury on alternative theories of guilt on constructive and actual possession of stolen property and aiding and abetting.

The jury returned a verdict of guilty. William Kirby was sentenced under the Narcotics Addict Rehabilitative Act.

The Charge

The jury recieved instructions on alternative theories of guilt. They were instructed that any or all of the co-defendants could be held accountable as a principal or as an aider and abetter to the offense charged (533-535).

There is a question, for the purpose of this appeal, concerning the District Judge's charge that in determining the guilt of the principal, the jury should consider actual as well as constructive possession.

The instruction was as follows:

> The charge here is knowing possession of stolen checks. That is possession with knowledge that the checks were stolen, The charge the charge that all three of these men were in possession of the stolen checks requires some discrimination.
>
> In the first place, we must think of the kind of possession we are talking about. There are two kinds. There is actual possession and there is such a thing as constructive possession which I will comment on.
>
> In the second place, we must ascertain who had possession-- all three or just one or two of the defendants. Of course, if the possession was not with knowledge that they were stolen that ends the case. In the third place, if only one or two, instead of all three had possession, then did the defendant or defendants who did not have possession aid and abet the defendant or defendants who did have possession? I know this is a little complicated but let us try to make it simple.
>
> WhenI am talking about possession or aiding and abetting, I am referring to possession or aiding and abetting with knowledge that the checks were stolen. Knowledge is the key factor in this case.

In the first place, possession may be actual physical possession of the stolen checks or it could be constructive possession. "Constructive possession" means that although a defendant did not actually have in his hands, physical possession of the stolen checks, his relationship with the stolen checks or proximity to them was such that he had dominion and control over the stolen checks either alone or with others. In other words, the checks could be in the car where all three could or could not have control, although none of them have them in their hands or even on their body. But, they could hace dominion and control over them jointly. Under such circumstances it is said that persons hace control over and dominion over such stolen property. Dominon and control are the key words to constructive possession. It is possible for all three defendants to have had either physical or constructive possession. It is possible for all three defendants to have had either physical or constructive possession jointly of the stolen checks. You may find that constructive possession is present if you find beyond a reasonable doubt that a particular defendant had actual or constructive possession; that is, dominion and control of the checks either alone or jointly with the other defendants.

To sum up, the stolen checks could have been in the joint physical or constructive possession of all three defendants or only two of the defendants or the stolen checks could have been only in the physical or constructive possession of one of the defendants. You will remember that all three were in the car at one time.

(539-541).

Judge Bartels further instructed that if the jury could find only one of the defendants guilty as a principal the jury had the right to consider whether the other defendants aided and abetted the principal in the crime charged.

If you find that the stolen checks were in the joint physical or constructive possession of all three defendants, then you need not consider the question of aiding and abetting, assuming that you find that it was in their joint possession knowing that the checks were stolen. If, however, you find that the possession, physical or constructive, of the stolen checks was jointly held by only two of the defendants, then you may proceed to ascertain whether the other one or two of the defendants aided or abetted the remaining one or two, as the case may be, in having or obtaining knowing possession of the stolen checks.

Mere presence of a person at the place where the checks were stolen is not sufficient, without more, to charge that person with constructive possession of the stolen checks. There must be some relationship by the defendant or defendants as the case may be, with the stolen checks. I am talking about constructive possession.

If you find that only one of the defendants had knowing illegal possession of the stolen checks, then you may ascertain whether the other one or the other two aided and abetted him in this knowing illegal possession of the stolen checks. I must, therefore, in this connection, instruct you that the mere presence, without more, of any defendant or defendants in the green Falcon car where there may have been illegal possession of the stolen checks, is not sufficient to charge him or them with aiding and abetting this illegal possession. Moreover, mere presence in the car and the knowledge by one or more of the defendants that another defendant or defendants was or were guilty of

illegal possession of the stolen checks is not sufficient to charge him or them with aiding and abetting. What I am trying to say to you is that presence in the car in which someone has illegal possession of stolen checks is not sufficient even though he knew someone did have in his possession illegally stolen checks. I must also state to you that, if you find that one defendant had knowing illegal possession of the stolen checks and one or two of the other defendants associated himself or themselves with the venture and if they became closely associated with the venture, so that, in fact, they were really participants in the illegal possession of the stolen checks knowing them to be stolen and seeking by their actions to make the illegal possession a successful illegal possession, then you may, if such facts are proven beyond a reasonable doubt, find them guilty of aiding and abetting the illegal possession.

(541-544)

Upon receiving the Court's instructions the Jury departed to the jury room. After three hours of extensive deliberation the jury had not been able to reach a verdict as to the guilt or innocence of the accussed, William Kirby. They returned to the Court with a question, whether there is a difference between constructive possession and aiding and abetting? (565) Judge Bartels answered this question in the negative, believing the inquiry to concern the elements of guilt of each theorey. Not more than twenty minutes after this supplemental instruction was given a verdict of guilty against the three defendants was brought forth.

ARGUMENT

Point I

THE APPELLANTS KIRBY'S CONVICTION BASED UPON POSSESSION OF STOLEN MAIL (18 U.S.C. section 1708, 2) IS ERROR AND MUST BE REVERSED AND DISMISSED FOR THE GOVERNMENT'S FAILURE TO PROVE IT'S CASE BEYOND A REASONABLE DOUBT. EITHER IN IT'S CHARGE OF POSSESSION OR AIDING AND ABETTING.

The guilt of William Kirby is based principally upon the testimony of George Attmore, who testified that he had observed the appellant sitting in a parked vehicle in close proximity to the mail jeep used by Mr. Attmore.

Even when following the philosophy set forth in Glasser v. United States 315 U.S. 60, at page 80, that on appeal evidence must be considered in the light most favorable to the government, there is simply no justification, on either of the alternative theories of guilt to support the verdict against William Kirby.

While there exists eye-witness testimony, from a single source, placing the appellant in a car near the jeep that is the subject of this action, and while Mr. Kirby was arrested by Inspectors who recovered the stolen checks from the automobile, there exists no link that places Mr. Kirby directly with the mail nor is there proof on any level that he was aware of the theft.

The factual pattern is fairly simple, only Elmore was ever seen out of the automobile, and it was Mr. Elmore's jacket that was wrapped around the mail. There exists no evidence which places possession of the stolen mail in Kirby's possession, either actual or constructive.

United States v. Infanti, 474 F. 2d 522 (2d Cir. 1973); United States v. Feore, 425 F.2d 107 (2d Cir. 1970).

There is no doubt that the law is well settled that if upon introduction of all the evidence and proof there still remains a reasonable doubt as to the innocence or guilt of the accused, it is the accused and not the Government which is entitled to the benefit: For it is not sufficient to establish a probability, to say " that is what probably happened", no matter how strong. If there is guilt as there is in this case an acquittal is demanded. Egan v. United States 52 App. D.C. 384,287 F 9581.

Mere proximity to the occurance of a crime is not sufficient and compelling reason to support a verdict against a defendant as an aider and abetter. United States v. Sisca 503 F. 2d 1337, 1343 (2d Cir. 1974) United States v. Cirillo 499 F 2d 872, 883 (2d Cir. 1974) United States v. Terrell 474 F 2d 872, 875 (2d Cir. 1973) United States v. Garquilo 310 F 2d 249, 253 (2d Cir. 1962). When a verdict is brought in under such circumstances it must be dismissed for failure to satisfy the reasonable doubt standard. United States v. Johnson 513 F 2d 819 (2d Cir. 1975) United States v. Steward 451 F 2d 1203 (2d Cir. 1971).

A very recent decision in a slip opinion 3073, 3095-3096 United States v. Reid (2d Cir. April 24, 1975) the second circuit has reaffirmed that when alternative theories of guilt are brought before the jury, and when the jury finds reasonable doubt on one of these theories the verdict must be reversed on all grounds as it would be impossible to ascertain on which of the alternatives the jury rested it's decision. Thus, if as in the present case, there is a faulty ruling as to the

possession segment of the charge, the aiding and abetting charge must likewise fail.

A. There was no suitable evidence offered at trial to support a finding that William Kirby was in actual or constructive possession of the stolen mail.

The law has longed debated the respective strengths to be applied to presumptions as oppossed to inferences. While that debate is of little concern to this appeal it is important to dwell on a particular inference, the inference of possession. A jury may be instructed that they are permitted, but in no way required, to draw an inference of guilt from a defendant who is in exclusive possession of recently stolen property. Bray v. United States, 133 U.S. App. D.C. 136 at page 140; 306 F.2d 743 at page 747 (1962); Goodwin v. United States, 121 U.S. App. D.C. 9 at page 11, 347 F. 2d 793, at page 795, cert. denied 382 U.S. 855 (1965). This inference may only be resorted to by the jury when the Government has suceeded in proving every essential element of the offense charged beyond a reaonable doubt. Bendergrast v. United States, 135 App. D.C. 20, 416 F.2d 776, cert. denied 395 U.S. 926 (1969. In re Winship, 397 U.S. 358, at page 362 (1970).

William Kirby was never in exclusive possession of the stolen checks. The appellant was never charged with theft of the mail merely he was accussed of being in unlawful possession of the articles. As exclusive and actual possession of the stolen property was not available to the Government in its case against Kirby, it was shackled with the much more difficult standard of constructive possession, a theorey that the accussed have "dominion and control" over the property. United States v. Infanti, supra, 474 F.2d 522

(2d Cir. 1973); United States v. Steward, 451 F.2d 1203, (2d Cir. 1971; United States v. Kearse supra, 444 F.2d 62 (2d Cir. 1971).

At best it might be said that Mr. Kirby was in "near proximity" of the stolen checks, in close relation but that is all. In the case of United States v. Infanti supra, the Court of Appeals stated that merely being in the same room was not a sufficient basis to adequately provide for either the control or dominion requisite in establishing constructive possession. 474 F.2d at pages 525-526.

Thus, applying the above cited cases to the instant set of facts it would be impossible to maintain the conviction of appellant Kirby. William Kirby was a passanger, and not the owner or driver, of a vehicle owned by Gary Singleton and while the necessary control of the vehicle could hold defendant Singleton it could not be so applied to Kirby. United States v. Febre supra, 425 F. 2d 409. The mail was discovered in a jacket that had been wrapped around it, the jacket belonged to defendant Elmore and while adequate dominion and control over the article of dress might be sufficient to hold that defendant, it would not be sufficient to hold William Kirby.

The decision in Arrelanes v. United States, 302 F.2d 603 (9th Cir. 1962); sheds additional light on this case. In Arrelanes a wife and husband were stopped by the police while driving in the family car, the husband was the operator the wife was sitting in the right hand passanger seat. A large quantity of marijuna was discovered in the back seat and while the Court held that the husband was in constructive possession of the drug a similar finding against the wife would have to fail for insufficiency of evidence.

Clearly the relationship between a husband and wife is far stronger than the relationship between the appellant and a person whom he termed as an acquaintance.

Further, as to the jacket of defendant Elmore; testimony was illicited at trial that it was a "beautiful day", it is not inconcievable that when Gary Singleton offered a ride to William Kirby and William Elmore that Elmore's jacket was already off, in it was contained the stolen mail and hidden in such a way that the appellant did not know its contents and because of the beautiful day, Kirby would not have questioned why his friend was not wearing his outer-clothing.

The record further reveals that both William Kirby and William Elmore respected the request of the Postal Inspector to get out of Singleton's car. Gary Singleton attempted to flee in the car, this could of been because he was afraid of the "police" or because he had a guilty concious, in either event it is patently unfair to transpose Singleton's acts unto the appellant Kirby. United States v. Heitmer, 149 F.2d 107, (2d Cir. 1945); United States v. Ayala, 307 F.2d 574 (2d Cir. 1962); United States v. Cirillo,468 F.2d 1233, (2d. Cir. 1972).

In holding an individual for "constructive possession" it is imperative t o return to Arrelane v. United States, supra, 302 F. 2d at 606, for a restatement of the rule.

> "...Mere proximity to the drug, mere presence on the property where it is located, or mere association without

> more with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession.

There can be no doubt that the Government's case against William F. Kirby failed to show possession, either actual or constructive, of the stolen checks and as such the decision should be reversed.

B. The Government failed to prove its case against William Kirby as to the charge of aiding and abetting.

A jury should be instructed that tc consitute the offense of aiding and abetting a person must not only by his presence aid, encourage or incite a principal to commit a crime, but he must share the criminal intent or purpose of the principal. United States v. Varelli, 407 F.2d 735 (1969); Morei v. United States, 127 F.2d 827 (1962); Jury Instructions in Aiding and Abetting Cases, 68 Columbia Law Review 774 (1968).

In United States v. Johnson, 513 F.2d 819 (2nd Cir. 1975); the test used by the Second Circuit was set forth. Relying principally upon United States v. Peoni, 100 F.2d 401 (2d Cir. 1938) and Nye and Nissen Corporation v. United States 336 U.S. 613 (1949) and United States v Terrelli, 474 F.2d 872 (2d Cir. 1972); the Johnson Court stated that for a person to be classified as an aider and abetter the appellant must associate himself with the undertaking of the principal in some manner; he "must participate in it as something he wishes to bring about or seek by his action to make it succeed."

Once again we are confronted with two factors, two factors which demand that the appellant have his conviction reversed. Firstly, there is absolutly no evidence in the record which suggests that Kirby had a conscious or unconcious desire to participate in the theft. On the contrary, Mr. Kirby himself testified that he had no part in it, a view that the government failed to refute.

Secondly, there remains reasonable doubt as to the culpability of the appellant, a doubt that the Government has failed to refute. It is possible for Kirby to be where he was without guilt, the fact that to some it may not seem likely is not important, the point is he had an excuse for his actions and his explanations were never discredited.

POINT II

THE DISTRICT COURT JUDGE'S OWN INTERFERENCE AT TRIAL RESULTED IN HIS FAILURE TO CONDUCT A FAIR AND IMPARTIAL TRIAL

It is respectfully submitted that the case involving William Kirby was perverted by the conduct of the trial judge. This ground for appeal must be included, however reluctantly, if William Kirby is to be given the benifit of thos rights guaranteed to him. This in spite of the respected and most honorable background of the District Court Judge.

> We are mindful of the fact that trials in the district court are not conducted under the cool and calm conditions of a quiet sanctuary or an ivory tower, and that enormous pressures are placed upon the district judges by an ever increasing criminal docket and a demand expressed in part by Rules of the Second Circuit Judicial Council for speedier trials of criminal defendants. These pressures can cause even conscientious members of the bench, such as the trial judge in this case, in their anxiety to keep pace with the flood of litigation to give vent to their frustrations by displaying anger and partisanship; when ordinarily they are able to supress these characteristics.

> But grave errors which result in serious prejudice to a defendant cannot be ignored simply because they grow out of difficult conditions.
>
> United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1972).

At the onset of this discussion it is reccomended that the entire record, including hearing, trial and sentencing be reread to appreciate the totality of the judge's interference.

The Bench must never give the impression that it is acting in the capacity of attorney. If the Judge's questions are too partisan, extensive, or numerous the Appellate Court must realize that the Court has crossed the line between judiciary and advocacy. United States v. Brandt, 196 F.2d 652 (2d Cir. 1952); United States v. Fry, 304 F.2d 296 (7th Cir. 1962).

While the specific number of interuptions by the Judge may not, in and of itself, be sufficient to set aside a verdict it is an indicia that the judge is acting in a capacity that is not traditionally associated with his role. United States v. Kelly,(CA # N.J.) 329 F. 2d 314; Woodring v. United States, 311 F. 2d 417, cert. denied 373 U.S. 913, 10 Led 414, 83 S.CT. 1304.

In the instant case, Judge Bartels answered for the witness, interupted counsel or questioned the witnesses over four hundred different times. These four hundred interuptions occurred in a slightly more than two day judicial proceeding, including a suppression hearing and trial. There can be no doubt that this would create a strong impression on the minds of not only the jury but the respective attoneys and defendants as well.

The length of this trial is essential for two reasons; firstly, as to realize the magnitude of the judicial intervention and secondly, to reflect the attitude of the Court as to how the trial should proceed. There is no doubt, that as a trial grows longer in length a greater tolerance towards the actions of the principal parties will be permitted but this same lattitude will not be granted on trials of a short duration. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972). A two day proceeding must be considered too short to gain this additional tolerance and four hundred interuptions must be considered to great an interference.

The law is well settled that remarks by the Court disparaging the subject of the litigation, or indicating that it is only of trivial concern are prejudicial and constitute reversible error. Meyers v. George, 271 F.2d 168, 86 ALR2d 1121; Habernich v. R.K.O. Theatres Inc. 23 App. D.v2d 378, 260 N.Y.S.2d 890. Twice during the process of the case Judge Bartels commented to the defense attorney's that he had no desire to prolong this trial and that he saw no reason "for this case to last a week" (96).

While a District Court Judge is granted greater leeway and flexibility in the conduct of his trials than many State justices his remarks during trial must remain judicial and dispassionate. Quercia v. United States, 289 U.S. 406, 77 L.Ed 1321; Frantz v. United States, 62 F.2d 737 (1933). This dispassionate role role demands that certain witnesses are not given greater credibility over others and a witnesses testimony cannot reflect, by the Court's acts, negativly on the attorney. Thus there is the requirment that the judge

display patience with counsel so as not to prejudice a party or create an impression of partisanship. United States v. Boatner, 478 F.2d 737, (2d Cir. 1973); United States v. Nazzaro, supra, 472 F.2d 302.

Time and time again at the trial of William Kirby and his co-defendants the trial judge supported the witness at the expense of the defense attorney's. The following is an example of that occurance.

> Mr. Maltz: We are talking about section 2.
>
> The Court: He already went over that in detail (with previous attoney questioning, not from Mr. Maltz) as I recall. Tell him again Mr. Attmore. You went up130th Avenue did you not, facing West, is that right?
>
> The Witness: I west up 130th Avenue facing West... (244-245)
>
> **********
>
> Mr. Maltz: Now Mr. Attmore, going to section 2, now I ask you again can you tell me how long that section took?
>
> The Court: He said about twelve minutes. Is that right approximately?
>
> The Witness: Approximately.
>
> The Court: If you were asked by him five more times would your answer be the same Mr. Attmore?
>
> The Witness: Yes it would.
>
> The Court: (Directed to Mr. Maltz) You cannot continue that way.

A judge conducting a trial with a jury is not "merely a moderator" but is the governor of the trial for the purpose of guaranteeing its proper conduct and in insuring a fair and impartial administration of justice between the parties involved in the litigation. Glaser v. United States, 315 U.S. 60, 86 L.Ed 680, 62 S.Ct 317; Quercia v.

United States, supra, 289 U.S. 466, 77 L.Ed 1321, 53 S.Ct 698; United States v. Curcio, 279 F.ed 681 (2d Cir. 1966). The judge must not even give the appearance of interference. Nor should he take the course of the trial out of the hands of competent attorny's nor should he inject remarks that indicate his own view of the evidence. United States v. Guertler, 147 F.2d 796 (2d Cir) cert. denied 65 S.Ct 1553, 892 L.Ed 1995; Hunter v. United States (5th Cir.) 62 F.2d 217. Obviously the cases cited in this section of the appeal are intended to protect counsel from intimidation by the Court. For in intimidating an attorney, you are rendering him useless to his client, denying the cliet of the constitutional guarantee of effective assistance of counsel.

The record of the Kirby case reveals on page 246 just such a prohibited occurrance. After a tentative and hesitant resting by Mr. Maltz, the defense attorney for Gary Singleton, the Court proceeded to ask the witness (mr. Attmore) some questions, upon conclusion of the questioning Mr. Maltz spoke:

> Mr. Maltz: May I take back my statement as to no further questions?
>
> The Court: Yes you may.
>
> Mr. Maltz: I was a little intimadated for a minute.

Mr. Maltz was a defense counse, the remarks forthcoming from Judge Bartels could not but influence the jury's attitude toward all of the defendants. While a trial must not lag and while it is the judge's function to expedite the trial as much as possible, and while he may do this by remarks addressed to counsel he can not and

must not forget that an attorney is an officier of the Court and the judge is under the affirmative duty not to impair the effectiveness of counsel. Atlantic Refining Company v. Jones, 58 F.2d 89, 94 A.L.R.2d 826; United States v. Link, (3rd Cir 1953) 202 F.2d 592. The forgoing is the law even, if in the judge's opinion, the attorney is not representing his client in an adequate fashion. United States v. Fernandez, 480 F. 2d 726 (2d Cir. 1973).

In the case of appellant Kirby, while there is not a complex factual situation they trial was labored as each of the defendant's had his own counsel. Each represented his own client, each had his own theorey of the case and each believed he had to make certain points to the jury. It is natural there would be some overlapping in the questioning of witnesses, this was to be expected, but even if this were not the realistic determination of the situation it would be incumbent upon the Government's lawyers to protect thei witnesses and not the trial jusge.

In view of the powerful and influential position occupied by a judge, when presiding at trial before a jury, he must be sure to guard against exploitation of that authority toward a conviction he may privately think deserved or even required by the evidence. United States v. Brandt, 196 F.ed 653 (2d Cir. 1952). A judge should especially refrain from any remarks calculated to influence the minds of the jury or to prejudice a litigant. This includes remarks to counsel touching on the managment of the case and reflecting on their conduct. Starr v. United States, 153 U.S. 614, 38 L.Ed 841, 14 S.Ct 911; Snyder v. Mass. 291 U.S. 97, 78 L.Ed 674, 54 S.Ct 330, 90 A.L.R. 575;

Sawyer v. United States, 202 U.S. 150, 50 L.Ed 372, 26 S.Ct. 575.

The Judge in this casefound it repeatidly necessary to criticize the defense counsel and in the attorney's manner of trial technique (See Appendix B and C). This tone of events may be demonstrated in the following statement by the Court. "I do not want you to feel that perhaps, as you indicated tc the jury, you are intimadated. This Court intimidates no one. It does insist you try the case in an ordinary way." (246)

As indicated above, in the Federal Courts the role of a judge is somewhat relaxed but the judge nevertheless must avoid extreme excercises of the power to comment. United States v. Lee, 107 F.2d 529 (1939); State v. Winchester 203 P.2d 229. A trial judges frequent and lengthy interuptions of a witness's testimony is objectionable as tending to give the jury the impression that the trial justice is biased in one way or another. United States v. Guglemini, 384 F.2d 602 (2d Cir. 1967) United States v. Perisco, 305 F.2d 534 (2d Cir. 1962). When a judge interupts the proceedings over four hundred times and the case is a relativly brief one, than there can be no doubt that there has been a far to great an interference and a reversal is demanded. United States v. DiSisto, 299 F.2d 833 (2d Cir. 1961.

The task upon appellate review is to appreciate the enormous wieght that a judge's comments have on the jury, Starr v. United States, supra, 153 U.S. 614; United States v. Link, supra, 202 F.2d 592; it must ascertain whether the Court's conduct has shifted the balance against the defendant and if it finds that such a result has occurred than a reversal is called for. United States v. Weiss, 491 F.2d 460,

(2d Cir. 1971); United States v. Boatner, supra, 478 F.2d 737 (2d Cir. 1973); United States v. Curcio, supra, 279 F.2d 681, (2d Cir. 1960).

The verdict against William M. Kirby must be reversed because of the extent and nature of the interferences on the part of the district judge.

POINT III

IT WAS PLAIN ERROR TO INSTRUCT THE JURY THAT THERE WAS NO DIFFERENCE BETWEEN A FINDING OF GUILT ON THE CONSTRUCTIVE POSSESSION THEOREY AND THE THEOREY OF AIDING AND ABETTING

Normally, an objection at trial is necessary to preserve a question for appeal; United States v. Carter, 420 F.2d 150, cert. denied, 397 U.S. 1017 (1970); United States v. Huff, 442 F.2d 885 (1971); however, plain error may be noticed at any time if it affects the substatial rights of the parties. Kotteakes v. United States, 328 U.S. 750 at page 765, (1946); United States v. Hammond, 138 U.S. App. D.C. 166, 425 F.2d 597 (1970).

In the instant case, Jusge Bartels instructed the jury that it was within their power to infer from the recent unexplained possession of the checks that the defendants had knowledge of the theft.

> Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in light of the surrounding circumstances shown by evidence in the

case, that the person in possession knew the property had been stolen. (544)

As indicated in Point I of this appeal, the law is well settled that a jury may be instructed, but is not required to draw an inference of guilt from a defendant who is in exclusive possession of recently stolen property. Bray v. United States, supra, 306 F.2d 743, at page 747; Rivera v. United States, 361 F.2d 553 at page 555-556, cert. denied 385 U.S. 938 (1968)

William Kirby was never in exclusive possession of the stolen checks and obviously there must be whether he was ever in possession, in whatever form, at all. The Court must point out to the jury that before they may resort to the inference the must find, to their satisfaction, that the Government has proven every essential element of the offense charged beyond a reasonable doubt. United States v. Johnson, 433 F.2d 776 (D.C. Cir. 1970); Pendergrast v. United States, supra, 416 F.2d 776, cert. denied 395 U.S. 929 (1969).

The District Judge failed to instruct the jury that if they could not find that William Kirby was in possession of the checks, either actual or constructive, but merely aided and abetted in the unlawful possession of the principal than the inference of knowledge would have to fail and it would be incumbent upon the Government to prove, as an essential element of the offense, an element to dispense with reasonable doubt, that independent knowledge existed on the part of the appellant Kirby. This is not a harmless error, on the contrary, the ommission of this instruction lessened the Governments burden of proof.

> When (the defendant) excercised his constitutional right to a jury, he put the Government to the burden of proving the elements of the crimes charged to the jury's satisfaction, not to ours or the district judge's. United States v. Howard, 506 F.2d 1131, at page 1134.

It is essential realize that the Court's failure to instruct the jury properly more than likely resulted in the appellants conviction at trial; this is evidenced when the jury returned to the court-room following extensive deliberation and placed a question at the hands of the district judge; e.g. whether there exists a difference between constructive possession and aiding and abetting; the district judge replied:

> That is a very intellegent question and the answer is that in the verdict it would make no difference which path is taken between constructive possession or aiding and abetting. It makes no difference. Do I make myself clear? It makes no difference. (565).

Clearly the supplemental instruction was faulty, by lumping aiding and abetting and constructive possession together the jury no longer had to ascertain an essential element of the charge. Constructive possession creates an inference that a defendant had the requisite knowledge that the property was stolen, there exists no such luxury on the charge of aiding and abetting which demands proof, by the Government, of the element of knowledge. United States v. Jones, 308 F.2d 26 (2d Cir. en banc 1962); United States v. Irving, 437 F.2d 649. In the Irving case, the Appellate Court determined that the trial judge's supplementary instruction on aiding and abetting

given at the jury's request for classification, consituted reversible error when the secondary instruction failed to instruct the jury as to the burden of the Government to prove each of the new elements beyond reasonable doubt.

When the Kirby Court failed to instruct the jury as to the quantum of proof needed by the Government it committed reversible error; an error causing the committment of William Kirby.

POINT IV

THE DISTRICT COURT ERRED IN SENTENCING APPELLANT KIRBY UNDER THE NARCOTIC ADDICT REHABILTATION ACT (18 U.S.C.A. 4251-4255) RATHER THAN UNDER THE YOUTH CORRECTIONS ACT (18 U.S.C.A. 5005 et seq.)

William Kirby was convicted and sentenced under the Narcotic Addict Rehabilation Act.

Presently, there is an enormous amount of confusion surrounding Youth Correction Act (Y.C.A.) and Narcotic Addict Rehabilitation Act (N.A.R.A.) treatment. The question that must be resolved is: are the two Acts, in essence, one and the same; that is, whether an individual under the age of twenty-two who is sentenced under N.A.R.A. will recieve the same treatment and benifits as he would if sentenced under the Y.C.A.; or in the alternative are the two Acts mutually exclusive having a coexistant rather than overlapping quality with Y.C.A. available to those 16-22 and N.A.R.A. available to those between the

ages of 23-26. And if the Acts are tangent is it error to place a person whose age qualifies him for Y.C.A. treatment into the N.A.R.A. program?

Clearly, the District Judge in sentencing William Kirby and Gary Singleton thought the two programs to be mutually exclusive as in the sentencing of the duo he consciously disregared Y.C.A. in favor of N.A.R.A. treatment.

In a recent Supreme Court decision, Dorzynski v. United States, 418 U.S. 424 (1974); the majority, in a virtual 5to 4 decision, stated in sentencing a youthful offender as an adult under other applicable penal statutes, section 5010(d) of the Federal Youthful Corrections Act requires a federal district court to "find" that the offender would not benefit from treatment under the Act, but does not require that such "finding" be accompanied by supportive reasoning. 418 U.S. at page 429.

While this ruling is contrary to the holdings in most of the districts it remains the law. The Second Circuit prior to Dorzynski followed the majority belief that an explicit finding was essential in denying a youthful offender Y.C.A. treatment. In Justice Marshall's concurring opinion in United States v. Kaylor, 491 F.2d 1133 (2d Cir. 1973) this theorey is stated:

> The finding requirement is an intregal part of the Y.C.A scheme. The stated premise of the Act is that young people between the ages of 18-22 are especially promising for rehabilitation. (page 448)
>
> **********
>
> The Borstal System of England, which served as a model for the Y.C.A.'s scheme in general...envisions a trial judge stating his reasons for sentencing an eligible offender as an adult. (page 448-449)

Thus, there existed the rule that a court must affirmativly find that the youthful offender will not benefit from rehabilitative treatment before he could be sentenced according to adult standards. United States v. Waters, 437 F.2d 722 (D.C.Cir. 1970). The Youth Corrections Act was established as a preferred sentencing alternative which was to be used unless the District Court was totally convinced that rehabilative treatment would be a futile waste of time. Cox v. United States, 473 F. 2d 334 (4th Cir. 1973). So strongly preferred was this alternative that when the record of a case revealed that the defendant was a youthful offender and nothing else, concerning treatment and/or sentencing, appeared on the record and the youth was held to adult standards, the sentence would be reversed for failing to consider Y.C.A. treatment. United States v. Coefield, 476 F.2d 1152 (D.C. Cir. 1973).

But Dorzynski, supra, apparantly reversed the need for explicit findings while leaving intact the philosophy that Y.C.A be maintained as a preferred sentencing alternative. It will be recommended that Dorzynski be further limited.

William Kirby was 19 when sentenced, while the District Judge fully realized that he had no duty to provide a reason for denying Y.C.A. treatment he proceeded to give a reason anyway. William Kirby was placed in the N.A.R.A. program because he was an addict. Judge Bartel's reasoning was faulty in both its scope and logic. Section 5011 of the Youth Correction Act provides the range of mality to be dealt with under the program, by its magnitude it unequivicably includes addiction.

It is perhaps unnecessary to state that youths under our system of jurispudence are to be given the greates leniency in sentencing. The normal treatment provided by our society for alleged offenders against its laws is a formal charge of the offense, a formal trial and if conviction results from the trial and then punishment or compulsory removal for a time from contact with society. Such offenses are obviously crimes and public records are kept. But from the earliest times children of certain ages have been deemed by our law to be incapable of crime. In more recent times children of various ages have been removed from the normal treatments provided for crimes and criminals. The rational for this is a belief that the intrests of society are best served by a solicitious care and training of those shown to be in need of such care. In the event such a child commits an offense against the law, the state assumes a position as parens patriae and cares for the child. Such a youthful offender is not accussed of a crime, not convicted of a crime, not deemed to be a criminal and no public record is made of his recorded offenses. Pee v. United States 274 F.2d 556 (1959); Rogers v. United States, 326 F. 2d 56 (1963); White v. Reid, 126 F. Supp. 867, Cunningham v. United States, 256 U.S. 467.

To hold appellant Kirby guilty under any other provision or theory is folly. There are far too many young people that participate in crimes because of their addiction, to have their lives ruined, to place them on a public record, to mix them with adults participants in far more serious offenses would be to discard these young people for what in many cases is an involuntary act.

The cases and law articles concerned with Y.C.A. and N.A.R.A are written in terms of additional alternatives available to the judge at time of sentencing. S. Rep. #1180, 81st Congress, 1st Session (1949). These alternatives, assuming them to be seperate and distinct, are grossly favored over penal committment. United States v. Kaylor, supra, 491 F.2d 1133, United States v. Waters, supra, 437 F.2d 722; Brooks v. United States,497 F.2d 1059 (6th Cir, 1974).

It has thus been established that Y.C.A. treatment is a preferred course of conduct to be taken by a judge in sentencing an individual under 22; it is also a preferred alternative to imprisonment. The record reveals that William M. Kirby is an addict, the Court took notice of this fact in sentencing the appellant. In Robinson v. California, 370 U.S. 660 (1962); the Supreme Court declared unconstitutional the punishment of an individual solely on the basis of his addiction. The protection and rights of the addict have been consistently, however tentativly, advanced since Robinson, finding penal punishment for addicts, who are motivated by their habit, to be within the confines of the Eighth and Fourteenth Amendments to the Constitution. Watson v. United States, 439 F.2d 442, (D.C. Cir. 1970); The "Untouchable Acts of Addiction," 55 A.B.A, J. 454 (1969).

Thus, it stands to reason that if a judge does not give a reason for his decision not to give youthful offender treatment under the Youth Corrections Act or if the district judge gives an erroneous reason, as is the fact in the instant case, there is a possibility if not probability that the Court has acted in an unconstitutional practice

of applying a criminal penalty to an individual on the basis of his conviction; this would be violative of the due process and cruel and inhuman punishment provisions of the Constitution.

The only concievable way this abuse can be avoided is if the judge is aware of the defendants' addiction he is under a duty if that child otherwise qualifies under the provisions of the Y.C.A. to give an explicit reason on the record for denying such treatment.

Appellant Kirby should have been granted federal youthful offender treatment, he should not be placed with older more experienced inmates, to do so is violative of the mores and traditions of our jurisprudence.

POINT V

PURSUANT TO RULE 28 (i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT KIRBY JOINS IN THE ARGUMENTS RAISED BY HIS CO-APPELLANTS IN THIS COURT INSOFAR AS THEY ARE APPLICABLE TO HIM AND NOT INCONSTENT WITH THE POINTS RAISED HEREIN.

CONCLUSION

For the forgoing reasons, the judgment of the District Court must be reversed and the indictment against appellant Kirby dismissed. In the alternative a new trial is ordered to determine if the sentencing of William Kirby was correct.

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